

EXHIBIT H

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 ENTESAR OSMAN KASHEF, *et al.*,

5 Plaintiffs,

6 v.

16 CV 3228 (AKH)

7 BNP PARIBAS SA, *et al.*,

8 Defendants.

Conference

9 New York, N.Y.

June 24, 2024

4:00 p.m.

10 Before:

11 HON. ALVIN K. HELLERSTEIN,

12 District Judge

13 APPEARANCES

14 HAUSFELD LLP

Attorneys for Plaintiffs

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-and-

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BY: CARMINE D. BOCCUZZI

22 ABENA MAINOO

1 THE COURT: Good afternoon. We have Michael Hausfeld?

2 MR. HAUSFELD: Yes, your Honor.

3 THE COURT: Scott Gilmore.

4 MR. GILMORE: Yes, your Honor.

5 THE COURT: Kathryn Lee Boyd.

6 MS. BOYD: Yes, your Honor.

7 THE COURT: And.

8 MR. BRUENING: Theodore Bruening.

9 MS. LEE-DASGUPTA: Amanda Lee-DasGupta.

10 THE COURT: For plaintiffs.

11 And for defendants, Karen Seymour.

12 MS. SEYMOUR: Good afternoon, your Honor.

13 THE COURT: Suhana Han.

14 MS. HAN: Good afternoon, your Honor.

15 THE COURT: Carmine Boccuzzi.

16 MR. BOCCUZZI: Good afternoon, your Honor.

17 THE COURT: Abena Mainoo.

18 MS. MAINOO: Good afternoon, your Honor.

19 THE COURT: Good afternoon to everybody.

20 First, I want to talk about some of the issues of
21 notice.

22 Why, Mr. Hausfeld, regarding the identity of class
23 members, not use the procedure of the *Touhy* case? *Touhy* says,
24 and 6 C.F.R. Section 5.45 provides, that the party seeking
25 release or testimony must set forth in writing and with as much

1 specificity as possible the nature and relevance of the
2 official information sought. You would ask in a *Touhy* letter,
3 giving a copy to the U.S. Attorney, exactly what you want,
4 namely, the list.

5 Now, I don't know if, under 8 C.F.R. Section 208.6,
6 you can get it because the authorization for the Department of
7 Homeland Security is any legal action arising from the
8 adjudication of the asylum application or from a credible fear
9 or determination.

10 There might be an issue.

11 MR. HAUSFELD: We felt, your Honor, under the
12 regulations, there was a provision for obtaining information in
13 pursuit of civil litigation.

14 THE COURT: What is that provision?

15 MS. BOYD: 5 U.S.C. 502(a).

16 THE COURT: Use it. Get it.

17 MR. HAUSFELD: We still need a court order, your
18 Honor.

19 THE COURT: Not according to 6 C.F.R. Section 545. I
20 am not going to issue a subpoena. If you want to give me an
21 order on motion, with a copy to the U.S. Attorney, we can have
22 a procedure.

23 MR. HAUSFELD: That was our sense, your Honor,
24 exactly.

25 THE COURT: Under 6 C.F.R. Section 545, you should try

1 voluntarily to get this information. Do that step. If they
2 say no or get a court order, then you come back to me.

3 MS. BOYD: We did that, your Honor.

4 THE COURT: I am not going to sign a subpoena willy
5 nilly.

6 MR. HAUSFELD: Yes, your Honor.

7 THE COURT: Should have been done. We are just
8 wasting time.

9 MS. BOYD: Your Honor, we did speak to the general
10 counsel of DHS, and we were told that voluntarily they cannot
11 help but in a court order, pursuant to this section, and we
12 would be able to get their help to turn over the information we
13 need.

14 THE COURT: I'm not giving you a court order unless I
15 get the view of the U.S. Attorney.

16 MS. BOYD: Very well.

17 THE COURT: There seems to be some confusion about the
18 nature of a trial. The nature of the trial will conform to the
19 certification. I set out the three issues in my order filed
20 May 9. There is no provision for damages in it. Damages are
21 individual.

22 There is some suggestion, Mr. Hausfeld, in your
23 papers, that somehow at the end of this class trial I'll issue
24 a judgment. It won't be an order.

25 MR. HAUSFELD: The order, your Honor, pursuant to the

1 issues you identified and certified, would be consistent with a
2 common injury.

3 THE COURT: There is no common injury. There may be
4 common injuries to some people but not all people. I don't see
5 that I can issue a judgment for damages because, even taking
6 your point of view, it would be a judgment that answers some of
7 the people but not all the people. Some people lost their
8 homes. Some people were raped. Some people were maimed. Some
9 people lost amounts of property and possessions. There are
10 variations in the loss.

11 MR. HAUSFELD: We agree with those variations, your
12 Honor. Those are not the variations that would apply to the
13 violation with regard to moral harm. That's a loss of dignity
14 for the fact of being unable to return to your homeland, losing
15 your culture and your life as you knew it.

16 THE COURT: I don't think I can make that
17 determination or a jury can make that determination outside of
18 the context of an entire loss that an individual suffers. I
19 think this is an individual-driven loss case with important
20 common issues that I can decide, and then the individual trials
21 will be left for different people.

22 MS. BOYD: Your Honor, with respect to your order,
23 common issues for trial, subsection D states: Whether such
24 acts of BNPP proximately caused the forcible displacement of
25 the members of the class from their homes and property. The

1 common issue is based on common proof of refugee asylum status,
2 which is common to everyone in this class because they have all
3 been adjudicated as not being able to return home by the U.S.
4 Government. That's common proof.

5 Now, the jury would ultimately not decide liability on
6 that fact. They would decide liability based on all the
7 evidence that B&P intends to put forward on forcible
8 displacement, which is also common evidence that life is better
9 here, that they fled a crumbling country, some of the arguments
10 you have heard Ms. Seymour make in this court.

11 With respect to proximate cause, your Honor, the jury
12 has to hear proximate cause of what, and what your Honor put in
13 the order was forced displacement, which is a Swiss code injury
14 of human dignity and general damages.

15 The circumstances of how they fled are not for this
16 trial, but the fact that they are refugees, that fact is a
17 judicially noticeable fact and it is common to everybody. But
18 causation without a causation of what is simply not going to
19 make sense to the jury and be -- it's not what your Honor put
20 in the order, is what I'm saying. The circumstances would not
21 be part of the trial. But the fact that they cannot return
22 home is a judicially noticeable, nonreviewable fact, and that
23 evidence is common to everyone and that is what makes it a
24 common injury.

25 THE COURT: I don't agree with you. What has been

1 decided is that they are refugees.

2 MS. BOYD: It has been.

3 THE COURT: For purpose of damages I don't believe

4 there is an issue about -- I don't know the answer to that.

5 I'm telling you this. What I'm saying is this. I can't split

6 damages.

7 MS. BOYD: You're right. But you can do general

8 damages for forcible displacement, nothing else, and then move

9 on to mass tort individualized injuries.

10 THE COURT: I can't monetize that.

11 MS. BOYD: But you can, your Honor. Because we have

12 case law on loss of human dignity, which is uniform across all

13 humans. It is not individualized when we cannot return home to

14 our home. That is a loss of human dignity under Swiss law,

15 which is the rule of decision in this court, Swiss law.

16 THE COURT: So what. Let's say there is a loss of

17 human dignity.

18 MS. BOYD: We can monetize that. It has been done in

19 case before in the Swiss courts. That's the law that we apply.

20 They can absolutely monetize it. It has been done here in this

21 court with respect --

22 THE COURT: That would be a floor for what, for more

23 damages?

24 MS. BOYD: It would be a general -- what we call

25 general damages under Swiss law. The individualized

1 circumstances are all part of the mass tort, and they would not
2 be part of that trial, so we wouldn't be taking testimony from
3 our victims on how they -- were they raped, did they lose their
4 property; just that they cannot return home because of a
5 campaign of persecution, your Honor, which is part of our class
6 trial, campaign of persecution. And the *Hussain* case talks
7 about this at the Ninth Circuit with respect to Sudan. A
8 campaign of persecution is part of the class.

9 THE COURT: Tell me when you finish.

10 MS. BOYD: Yes, sir.

11 THE COURT: I can adjudicate that, but I can't put
12 into money what this loss of human dignity is until I get an
13 entire case for an individual.

14 Now, you say about the Swiss cases. Do you have any
15 Swiss case that affirmed the judgment for money based on the
16 loss of dignity?

17 MS. BOYD: Yes.

18 MR. HAUSFELD: There are cases, your Honor, in the
19 European court of human rights.

20 MS. BOYD: Which is the court of highest -- it's the
21 court of highest appeal in Switzerland. Yes, we do, your
22 Honor. We do have those cases. The loss of human dignity has
23 been monetized. It doesn't go into the individualized
24 circumstances of fleeing.

25 THE COURT: How much is it worth?

1 MS. BOYD: 50,000 euros upward to 150,000 euros.
2 That's about the range. We have them. We have shared them
3 with the defendants.

4 THE COURT: If it's a range.

5 MS. BOYD: Your Honor, there have been many cases of
6 loss of human dignity for being unable to return home. The
7 focus here is unable to return home, which is how refugees are
8 defined, by the way, in the U.S. Code.

9 The circumstances of fleeing is definitely not what we
10 are going to be putting on at the class trial. It's the fact
11 that they cannot return home due to a campaign of persecution,
12 which will be proven, and of course there will be evidence
13 against that campaign of persecution by Sudan.

14 MR. HAUSFELD: Your Honor, if I may, I understand one
15 is concerned about a damage award. But from the issues that
16 you certified, all on the basis of common facts, applied to a
17 common population with common characteristics based upon common
18 conduct by both the regime, as well as the bank, that resulted
19 in a forcible displacement and inability to return home.
20 Arising out of those common elements is the injury that Swiss
21 law and the European court of human rights recognizes as a
22 separate tort to which they have assigned an ability to award a
23 damage award for that loss which every single refugee asylee
24 has experienced.

25 THE COURT: How much do they assign?

1 MS. BOYD: 50,000 euro.

2 THE COURT: Ms. Boyd, either you'll talk or
3 Mr. Hausfeld will talk.

4 MS. BOYD: Yes, sir.

5 MR. HAUSFELD: In any situation, your Honor, even
6 involving pecuniary damages, there is always the possibility of
7 the element of intentional infliction or negligent infliction
8 or mental distress or PTSD. Those are awards that are separate
9 from the physical damage.

10 In this case there is a set of circumstances that give
11 rise to an injury recognized under Swiss and European law for
12 forcible displacement.

13 How it was set up in your certification order leads
14 naturally and proximately to an award of damage for that injury
15 applicable to the entire population of refugees and asylees.

16 THE COURT: Subparagraph D states: Whether such acts
17 of Bank Paribas proximately caused the forcible displacement of
18 members of the class from their homes and property, and other
19 injuries to be tried in individual cases.

20 You're arguing that if the judgment is that there was
21 forcible displacement from homes and property, that can be
22 subsumed in a monetary judgment?

23 MR. HAUSFELD: Yes, your Honor.

24 MS. BOYD: And other individual injuries will be the
25 subject of the bellwether trials for mass tort.

1 THE COURT: You're saying that there are cases in the
2 European union that monetize the forcible displacement.

3 MR. HAUSFELD: Yes, your Honor.

4 THE COURT: And they range from what?

5 MR. HAUSFELD: 50,000 euro to 150,000 euro.

6 THE COURT: Depending on what?

7 MR. HAUSFELD: Depending upon the circumstances of the
8 forcible displacement.

9 MS. BOYD: Campaign of persecution.

10 THE COURT: I can't deal with both of you speaking.

11 Why don't you take a few minutes and decide between
12 you who will be the spokesperson.

13 MS. BOYD: Mr. Hausfeld.

14 THE COURT: Otherwise, I don't want to hear you.

15 Who is going to be the spokesperson?

16 MS. BOYD: Mr. Hausfeld.

17 THE COURT: Depending on what circumstances?

18 MR. HAUSFELD: The circumstances causing the inability
19 to return, and here, your Honor, you have a situation not
20 unlike --

21 THE COURT: What do you mean, depending on inability
22 to return? Some people can return, some people can't return?

23 MR. HAUSFELD: For fear of persecution at a time when
24 the government in Sudan was conducting an intense campaign of
25 persecution on its targeted persons.

1 THE COURT: I grant you that, and presumably all
2 members can't go home, but their homes are worth different sums
3 of money. So there is, you're saying, an element of emotional
4 damage that is the forcible displacement.

5 MR. HAUSFELD: Yes.

6 THE COURT: The loss of dignity.

7 MR. HAUSFELD: Yes.

8 THE COURT: What say you, Ms. Seymour?

9 MR. BOCCUZZI: I was going to address this, your
10 Honor.

11 THE COURT: Yes, go ahead.

12 MR. BOCCUZZI: There are very few things that the
13 Swiss law experts in this case agree on, but one thing they do
14 agree on is that Swiss law damages, whether it's property
15 damage or what is called moral damage, which I think is what
16 plaintiffs' counsel are discussing, is done on an
17 individualized basis. And here forcible displacement is a
18 specific kind of illicit act. It's actually the government
19 driving someone from their property.

20 The cases that they are referencing in the European
21 Court of Human Rights, they actually do differentiate based on
22 the circumstances of the forced displacement in that case. So
23 there, the *Burlya* case I think they are referencing, there were
24 19 plaintiffs. Some were actually in their house when the mobs
25 came and drove them from their house in Ukraine. Others were

not there and found out about it later. There was, therefore, a difference in the amount awarded based on that. Moral damages are not just a free-floating thing that you can just pick a number and generalize it.

And, importantly, there is no claim for forced displacement. That's just based on, I can't return to my country. Forced displacement is all the factors your Honor was referencing in terms of if you're driven from your home, and then there is all the other individual claims that they might bring in terms of physical abuse, wrongful interrogation, etc. But there is no free-floating general, common damage or forced displacement either in Swiss law or in the cases they talk to. There is not a free-floating, quote, dignity injury. Moral damages always links back to the tortious act that the person suffers. It's kind of like pain-and-suffering component.

THE COURT: Mr. Boccuzzi, how far do I go under D? Let's say I find for the plaintiffs. Your theory is that I issue an order saying that Bank Paribas proximately caused the forcible displacement of the class from their homes and property. I stop there.

MR. BOCCUZZI: The way this order is framed, if that's the answer that the jury gives to the common injury point, the claim common injury and forcible displacement, then that's correct.

THE COURT: Mr. Hausfeld, what comes after that, if

1 anything, in the order?

2 MR. HAUSFELD: For me, your Honor, as I understand,
3 again, the questions and the concept of forcible displacement
4 would be what damage did the class suffer as a result of being
5 unable to return to their home and their lives and their
6 families. And everything -- their history because there was a
7 continued campaign of persecution.

8 THE COURT: So you're saying that there is an amount
9 that could be ascribed to each and all members of the class for
10 loss of homes.

11 MR. HAUSFELD: Yes. A common amount for being unable
12 to return, not because someone else is living in your house,
13 but, as the Second Circuit said in one case involving Jewish
14 persons who did not want to return to Germany during the Third
15 Reich. They fled because of fear of persecution, and they
16 couldn't return because of fear of persecution, and they lost
17 that family value that the European Court of Human Rights said
18 every person has a dignity to have.

19 MS. BOYD: If I may.

20 THE COURT: Ms. Boyd, no, you can't.

21 Mr. Boccuzzi, what presumptive value, if any, does the
22 adjudication of the immigration court have?

23 MR. BOCCUZZI: Your Honor, other than helping us know
24 who meets your class definition, that's it, because to be a
25 refugee under U.S. law, that means you either suffered

1 persecution or had a reasonable fear of persecution. A
2 reasonable fear of persecution does not equal suffering the
3 illicit act of forcible displacement under Swiss law.

4 This concept, again, they say comes to Swiss law
5 through the European Court of Human Rights and that case law.
6 The one expert, former judge of that court, Judge Keller, whose
7 declaration your Honor has, says that the determination of
8 forced displacement is not linked to U.S. refugee status or
9 other refugee status. It's derived from the facts of the case,
10 like the *Burlya* case, where an individual was driven from their
11 home.

12 That is completely divorced from the black-box result
13 of the refugee status process that the U.S. Government goes
14 through that says someone is a refugee or an asylee. Don't
15 forget, this class includes asylees. Those are people who are
16 here and say I want asylum because I have a reasonable fear
17 that if I go back there, I will be persecuted.

18 Your Honor, I think it's plain that the result of that
19 black-box administrative proceeding -- we are not challenging
20 that they are not rightfully deemed refugees or asylees. But
21 the result of that proceeding would just confuse a jury or
22 other fact finder in terms of how that relates to forcible
23 displacement.

24 THE COURT: One of the facts that must be determined
25 to grant asylum status and also grant refugee status is that

1 you can't return to your home without being persecuted. If I
2 remember the law, there are categories mostly having to do with
3 punishment for your religious or political expressions or
4 joining various groups and the fear of persecution if you come
5 home. Those would be the findings of the immigration court.
6 That's, in effect, tantamount to the issue, can I go home again
7 or forcible displacement. It's the same issue.

8 Now, it's not a court that has determined that. It's
9 an administrative agency. I don't know if it's the immigration
10 judge or the Board of Immigration Appeals or what, or a fiat of
11 the Department of State.

12 What is the source of the determination that a person
13 can't go home again and deserves refugee or asylum status?

14 MS. MAINOO: Your Honor, I will speak to this.

15 The determination of whether an individual qualifies
16 to be a refugee or an asylee depends on whether the individual
17 experienced persecution or had a well-founded fear of
18 persecution on account of a protected characteristic and is
19 unable or unwilling to return and is unable or unwilling to
20 avail herself of the protection of her country on that basis.

21 THE COURT: Stop. That's the very point that
22 Mr. Hausfeld wants to prove.

23 MS. MAINOO: But it's not, your Honor, for two
24 reasons.

25 First, refugee or asylee status does not mean that a

1 particular government, for example, the government of Sudan,
2 persecuted an individual or caused her to have reasonable fear
3 of persecution. The Second Circuit --

4 THE COURT: Stop. Why not?

5 MS. MAINOO: Because the Second Circuit has explained
6 that persecution can be at the hands of the government or at
7 the hands of an organization or person from which the
8 government cannot or will not protect the applicant, and that's
9 in the *Castro-Perez* case. That's 833F --

10 THE COURT: If there are roving bands and the
11 government does nothing about it, under our immigration law
12 that is grounds to grant refugee or asylum status. Under
13 practical grounds here it means I can't go home again.

14 MS. MAINOO: Correct. Also, if an applicant's
15 partner, domestic partner, abuses her and the government cannot
16 protect her, that's also grounds for refugee or asylee status.

17 THE COURT: The proofs that will be coming in on the
18 other issues will make that point academic.

19 MS. MAINOO: The other reason, your Honor, is that --

20 THE COURT: Let me ask you this question. Let's
21 suppose that the plaintiffs prove A, B, and C. Doesn't D
22 follow from the immigration decision?

23 MS. MAINOO: Your question is, if the plaintiffs prove
24 A, B, and C, does D follow from the immigration decision? It
25 does not.

1 THE COURT: Why not?

2 MS. MAINOO: Again, as I was explaining --

3 THE COURT: The only one there that would be an
4 exception would be domestic abuse, but that's precluded by the
5 finding under A.

6 MS. MAINOO: No, your Honor. I was giving the example
7 of domestic abuse just to show that an applicant can get
8 refugee or asylee status based on the actions of a private
9 actor and not necessarily based on the actions of a government,
10 here, the government of Sudan.

11 THE COURT: The first question is whether the
12 government of Sudan persecuted class members or caused them to
13 have reasonable fears of persecution because of their race,
14 religion, or ethnicity between November 1997 and December 2011.
15 That's the government of Sudan, not an individual.

16 The question I have really is what value I accord the
17 decision of the immigration judge. I don't know if it went up
18 beyond that. Tell me, by what fiat is a person adjudged a
19 refugee or an asylee?

20 MR. BOCCUZZI: I think it's just a determination by
21 USCIS.

22 THE COURT: By whom?

23 MS. MAINOO: USCIS, the U.S. Citizenship and
24 Immigration Services.

25 THE COURT: Only one person, please.

1 MS. MAINOO: It's an administrative agency, the U.S.
2 Citizenship and Immigration Services. And for all of the
3 named --

4 THE COURT: Is that a procedure?

5 MS. MAINOO: No. It's a determination by an official.
6 It's not an adjudicative process. It's not an adversarial
7 process. For all of the named plaintiffs in this case, they
8 are all refugees.

9 THE COURT: Doesn't that mean that it's admissible
10 under 803(8)?

11 MS. MAINOO: It does not because 803(8) addresses --
12 803(8), for example, addresses factual investigations from --
13 factual findings from a legally authorized investigation.

14 THE COURT: Well --

15 MS. MAINOO: The determination of whether an applicant
16 is a refugee or asylee is not based on any investigation. It's
17 a legal conclusion about whether the applicant met the
18 statutory criteria.

19 THE COURT: But there hasn't been an adversary
20 proceeding.

21 MS. MAINOO: There has not been an adversarial
22 process. There is no judge. There is no hearing. There are
23 no witnesses.

24 THE COURT: I don't believe I can give it more than an
25 admissibility status.

1 MS. MAINOO: Right. I would also add that the BNP
2 defendants were not involved at all in that administrative
3 determination, so we certainly had no opportunity to litigate
4 any issue.

5 THE COURT: Mr. Hausfeld, do I give it more than
6 803(8) standing?

7 MS. BOYD: Yes.

8 THE COURT: Ms. Boy, will you please keep quiet or be
9 the spokesperson, one or the other. You choose.

10 Yes, Mr. Hausfeld.

11 MR. HAUSFELD: It is admissible, your Honor, and it is
12 also highly probative. It's also consistent with the one.

13 THE COURT: Is it presumptive?

14 MR. HAUSFELD: It's presumptive, your Honor, in my
15 judgment, along with all of the other evidence that there was a
16 campaign of persecution.

17 THE COURT: If it's presumptive, you don't need any
18 other evidence. It is up to the other side to bring in
19 evidence.

20 MR. HAUSFELD: Here is the connection that counsel for
21 BNP made but then distorted. The fact of refugee status or
22 asylee status is a fact, and it is based on objective criteria
23 which courts have recognized is nonreviewable. That is the
24 fact of your status. That status has to be considered in
25 connection with the violation of Swiss law. So along with the

1 other factors, does that fear of persecution render you unable
2 to return because there is an ongoing campaign of persecution?

3 THE COURT: I hear everything you say. It's not
4 argument now. It's a technical point. What status is it?

5 Let's say that Ms. Mainoo wants to come up and argue
6 that, no, no, they could have come back. Is she precluded?

7 MR. HAUSFELD: On one hand, your Honor, I would like
8 to say, no, they are not precluded. On the other hand -- I got
9 that backwards. On one hand, I'd like to say, yes, they are
10 precluded. On the other hand, if they really want to test
11 their credibility, sure. Say these people who are targeted for
12 persecution, where there was a campaign of persecution, where
13 the world condemned the persecution, and BNP refused to
14 recognize that it was ongoing, sure they could have returned.

15 THE COURT: I think where I come out on this is that
16 it's admissible under 803(8). And if there is no further
17 proof, that would be sufficient *prima facie* for a final order.
18 If there is additional proof, then I have to deal with the
19 proofs to find out what's persuasive.

20 Actually, this would be a jury question, wouldn't it?

21 MR. HAUSFELD: Yes, your Honor.

22 MS. MAINOO: Your Honor, if I may just be heard
23 further on this issue.

24 Any evidence underlying a determination that a class
25 member is a refugee or an asylee is useable to the extent that

1 is admissible. But the conclusions that are reflected in the
2 determination that a class member is a refugee or asylee is not
3 in itself admissible evidence.

4 THE COURT: What is not admissible?

5 MS. MAINOO: The determination by the U.S. agency that
6 a class member satisfied the statutory criteria to qualify as
7 an asylee or refugee.

8 THE COURT: I disagree. That's what they precisely
9 held. That's their precise holding, that you're entitled to be
10 a refugee or an asylee.

11 MS. MAINOO: That is a legal conclusion, your Honor,
12 and in the 9/11 litigation you had said, your Honor, that legal
13 conclusions are not -- are likely not admissible under 803(8).
14 In the 9/11 litigation, you admitted certain findings from the
15 9/11 report in the 9/11 litigation, and there, in saying that
16 those findings were admissible under the 803(8) exception --

17 THE COURT: What case are you citing, *Bavis*?

18 MS. MAINOO: *In Re September 11 litigation*, 621
19 F.Supp. 2d. 131 (S.D.N.Y. 2009).

20 THE COURT: They are all entitled the same way. Which
21 particular case is that? Is that the *Bavis* case?

22 MS. MAINOO: Excuse me, your Honor?

23 THE COURT: Is that the *Bavis* case, B-a-v-i-s?

24 MS. MAINOO: I will need to get back to you on that,
25 your Honor.

1 But the point from the September 11 litigation, you
2 explained that the findings from the report that you admitted
3 were written following an investigation by a public commission.

4 THE COURT: I would have held, and I don't know if I
5 have ever held, but I would have held that it was admissible
6 under 803(8).

7 MS. MAINOO: Under 803(8). You said that there was a
8 public commission that did an investigation, heard 160
9 witnesses.

10 THE COURT: I know what I said. It would have been
11 admissible under 803(8).

12 You're not paying attention to me. I'm saying that
13 it's admissible. Without further proof it will be sufficient
14 for a judgment. If there is further proof, I have to consider
15 the ruling versus the other proof, or whatever else comes in.

16 MS. MAINOO: I am saying it's not admissible because
17 it is hearsay. That does not qualify for any hearsay
18 exception, including 803(8).

19 THE COURT: I would hold it as 803(8). It has all the
20 earmarks of 803(8).

21 MS. MAINOO: There are not guarantees of
22 trustworthiness. There was no hearing. There were no
23 witnesses. There was no equivalent of cross-examination. In
24 addition, it does not even meet the requirements of 803(8)
25 because it does not reflect factual findings from a legally

1 authorized investigation.

2 THE COURT: Federal Rule of Evidence 803(8): A record
3 or a statement of a public office -- the immigration decision
4 is a record -- if it sets out the office's activities.

5 The immigration tribunal is set out and is authorized,
6 so that is satisfied.

7 A matter observed while under a legal duty to report.
8 That's certainly the case of the immigration official in a
9 civil case or against the government in a criminal case.

10 Factual findings from a legally authorized
11 investigation. This is a legally authorized investigation into
12 the province of the person coming before the tribunal to see if
13 that person qualifies for refugee status or asylee status.

14 (Continued on next page)

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1 And, B, the opponent does not show that the source of
2 information or other circumstances indicate a lack of
3 trustworthiness. It would be up to you to show that.

4 MS. MAINOO: Your Honor, I think that the --

5 THE COURT: In the absence of proof that there is a
6 lack of trustworthiness of these findings, I rule that 803(8)
7 applies. That's my ruling.

8 MS. MAINOO: Your Honor, just to clarify, I think
9 there's a misunderstanding about how these determinations were
10 made, right. As I explained, all of the named plaintiffs here
11 are refugees. That means that they were determined to be
12 refugees based on a bureaucratic process. According to
13 plaintiffs' own immigration experts, to apply for refugee
14 status, an applicant fills out an intake form and then
15 undergoes an interview by an United States intake personnel;
16 and then, there's a determination whether the applicant
17 qualifies as a refugee mainly based on this intake form and
18 interview. So this process that you were describing involving
19 a tribunal and maybe there's a hearing, there is none of that.

20 THE COURT: I didn't say anything about tribunal.
21 We're talking about a decision by a judicial agency or an
22 administrative court. We're talking about a public record in
23 the manner described here.

24 MS. MAINOO: But an individual's status --

25 THE COURT: I ruled.

1 MS. MAINOO: An individual's status as a refugee or
2 asylee is not a public record, your Honor. It's a
3 determination about whether they meet statutory criteria.

4 THE COURT: I hold that it applies, that under rule
5 803(8) that it's admissible, and without further proof, it's
6 sufficient to base a final order.

7 If I'm correct, that there will be no judgment on the
8 issues that have to be litigated, there has to be an additional
9 proceeding, a rather complicated one, to apply individual
10 judgments to each particular case. It's very complicated. The
11 first step with a notice that's being developed now sets up an
12 opt-out class; namely, the individuals who are in the class, if
13 they don't opt out, are included. A very important
14 consideration for the defendant because the defendant needs to
15 have finality in the case of any settlement.

16 Without an understanding of who is in and who is out
17 of the class, there can't be such finality. The problem I
18 have, Mr. Hausfeld, and I look upon you to resolve this
19 problem, is how to have a reasonably ascertainable class, by
20 which I mean, ascertainable individuals. So if two or three
21 years from now, someone pops up and says, I want to sue Bank
22 Paribas. Bank Paribas says there was a discharge in the lease,
23 and if you don't know who is in the class and who is not in the
24 class, how can you do it?

25 MR. HAUSFELD: Your Honor, I apologize for not raising

1 this before, but may I argue from the seat?

2 THE COURT: Sorry?

3 MR. HAUSFELD: May I argue seated as opposed to
4 standing?

5 THE COURT: Yes.

6 MR. HAUSFELD: Thank you, your Honor.

7 That is an additional question that permeates almost
8 every class. This class is exceptional. By definition, you've
9 ascertained and identified them. They are refugee -- they are
10 individuals who have achieved refugee and asylee status.

11 THE COURT: How do know who is a refugee or an asylee?

12 MR. HAUSFELD: There are records that the government
13 has.

14 THE COURT: How are you going to get those records?

15 MR. HAUSFELD: Yes, your Honor. We'll ask for them.

16 THE COURT: Yes, and if you don't get those records,
17 we'll have to figure out what else to do. But if you get them,
18 we'll have them.

19 MR. HAUSFELD: That's one.

20 THE COURT: Now, let's say you address a letter to the
21 last known addresses, a certain number of them will come back.
22 How are you going to find who they are? You'll know every
23 name. You'll know every single name. You may not be able to
24 find them.

25 MR. HAUSFELD: Correct.

1 THE COURT: So the means you have laid out to find
2 them seem to be reasonable and appropriate.

3 MR. HAUSFELD: And we've gone to an expert in the
4 field.

5 THE COURT: Provided, and this is a basic provision,
6 that we know all the names.

7 MR. HAUSFELD: Yes.

8 THE COURT: Do you have any problem with that,
9 defendants? Who is going to speak, Mr. Boccuzzi?

10 MR. BOCCUZZI: I apologize, your Honor. I didn't hear
11 the last few words you said about knowing and not knowing the
12 names.

13 THE COURT: I said that we would know the names of
14 every individual who would classify as a refugee or asylee
15 because the government has those names. And assuming that
16 Mr. Hausfeld, using the *Touhy* procedures, will obtain their
17 names, the question then becomes if they are not at their last
18 known addresses, how to reach them. So here, a reasonable
19 method of finding them is such as described by the plaintiffs,
20 and if they use those methods, it seems to me, I should find
21 that the notice requirement of Rule 23 is satisfied. But if
22 they don't get the names of the people, then we have to
23 consider this issue further.

24 MR. BOCCUZZI: Consider the issue?

25 THE COURT: Further.

1 MR. BOCCUZZI: I think that's right. I mean, in their
2 proposed procedures, they essentially discuss a three-pronged
3 approach. One, going to the government, and we put in our
4 response that we think the government needs to be asked through
5 this *Touhy* procedure or otherwise --

6 THE COURT: If you sit down and use the microphone,
7 I'll hear you better.

8 MR. BERKE: OK. Is this better?

9 THE COURT: Yes.

10 MR. BERKE: So we put in our response that, yes, they
11 should go through the government, either through this *Touhy*
12 process or otherwise, to figure out what the government is able
13 and willing to do. Because it's not simply refugee or asylee
14 status; it's refugee or asylee status with individuals who
15 lived in Sudan during the class period, so 1997 to 2011.
16 Obviously, you know, there's been years before and years after
17 that when people lived in that country --

18 THE COURT: Not a problem because we have an opt-out
19 situation, and if we give notice to more than the people in the
20 class, no harm done. When we assess damages, we'd have to have
21 another procedure, a claims procedure of some sort. That we'll
22 get to in a few minutes.

23 MR. BOCCUZZI: OK.

24 THE COURT: But at the initial stage, we shouldn't
25 care if the notice goes to more people than it has to go to.

1 MR. BOCCUZZI: Assuming between what the government
2 does, what these relocation organizations do, and then the
3 other notice that they proposed through the media, that
4 three-pronged approach seems like it's sufficient under the
5 case law. As your Honor said, if the government comes back and
6 says, We don't have the information in this form or We can't do
7 this, then we need to reassess.

8 THE COURT: Yes. I'm not keen on the idea that the
9 government will issue the notice. It seems to me that it's my
10 responsibility as a judge and this Court's responsibility to
11 have the notice administered accountable to the Court. All
12 right. So do your wonders, Mr. Hausfeld.

13 MR. HAUSFELD: We believe, your Honor, as you just
14 said, that it is your responsibility to do exactly as you
15 identified.

16 THE COURT: And let it come back. And let's talk
17 about what happens after. You haven't given me a form of
18 notice yet, and you have to do that.

19 MR. HAUSFELD: Yes.

20 THE COURT: You have to exhaust the *Touhy* procedures.
21 You haven't done that.

22 MR. HAUSFELD: Yes.

23 THE COURT: But let's now talk about what happens
24 afterwards. We have a trial. It's a jury trial, and we have
25 common issues. If I'm correct in my view, there's no judgment

1 here. The next step, assuming that the plaintiff wins on these
2 issues, is to create a procedure by which we can eventuate with
3 either jury trials or a firm objective basis for settlements.
4 And here, I think, we can make use of the procedures that we
5 used in the 9/11 litigation.

6 I will propose that if you get the final orders that
7 you expect, the next step would be to ask the people in the
8 class to come forward and make their claims. And then, we work
9 out with a special master a series of questions in the form of
10 interrogatories that would require individual answers. Based
11 on those individual answers, we can create bellwether
12 procedures for depositions and trials. That worked in the 9/11
13 case. It should work here. It will create an objective basis
14 for making distribution of any awards. It will require
15 plaintiffs to come forward and swear to the verities of their
16 complaints, their claims, and it will allow a creation of a
17 joint database so that everyone is on the same territory in
18 deciding values if we settle or going to trials if we don't.

19 This is a framework that I think we can work under.
20 It's early for commenting, but what do you think, Mr. Hausfeld?

21 MR. HAUSFELD: I would like to think a little more
22 about it, your Honor. But I would ask this question: In the
23 first trial, and I see what your Honor is attempting to put
24 together with the individual trials, would it not be consistent
25 to have the jury award at least an amount for the moral damage

1 common to all that they would then add at the individual trial
2 when those individual trials came up?

3 THE COURT: This is the point that Ms. Boyd has argued
4 with such passion, and it's a serious point. I don't think any
5 courts confronted this issue because our law is based on
6 individual rights, and I'm concerned about splitting causes of
7 action. I'm concerned of either an inability or unfairness in
8 asking a jury to place an amount without that jury being able
9 to assess an entire situation.

10 Damages are now forms of full trials, enable the jury
11 to look at the whole person and assess damages, particularly
12 noneconomic damages, and we are working with noneconomic
13 damages. To these noneconomic damages, there will be different
14 values on the homestead, different values on the personal
15 possessions, different values according to the injuries,
16 personal injuries, suffered by the people. It's a complex
17 situation, and I am not a fan of letting a jury come to a
18 monetary sum in the abstract.

19 MR. HAUSFELD: I don't believe, your Honor, in this
20 instance when you are dealing with persecution, there's an
21 abstraction in terms of an assessment of a non-pecuniary
22 damage. If you have a government that is engaged in a campaign
23 of persecution which is consciously assisted by a bank enabling
24 it to do so, and people flee that persecution and then are
25 presented with the issue when they asked for entry into the

1 United States and the United States determines, What do I do?
2 Do I let you in or do I force you to go back? That's forcible
3 displacement because you're putting the refugee or the asylee
4 in a position of having to say: Do I want to go back
5 voluntarily to a government that I know has targeted me for
6 persecution?

7 THE COURT: We're passed that. You've already proved
8 those points. The question is whether we put a monetary amount
9 on it.

10 MR. HAUSFELD: And that's what I'm getting to.

11 THE COURT: And that's the question that I have grave
12 concern about.

13 MR. HAUSFELD: Everyone has a right not to be put in
14 that position. Everyone has a general right to a life deprived
15 by reason of persecution, and that right should be equal to
16 all. There may be aggravating circumstances, your Honor, which
17 add to that injury, but that injury of that right to life, that
18 right to your history, your culture, your homeland, that is a
19 right that I believe a jury can assess and award damage per
20 individual and then have that added to the aggravating rights.

21 THE COURT: Suppose defendants wanted to settle.
22 Let's say I accept your argument. The jury fixes a monetary
23 award, what, for the class as a whole?

24 MR. HAUSFELD: They could do that because then there
25 still would have to be --

1 THE COURT: How do you know how many people are in the
2 class?

3 MR. HAUSFELD: Here is the issue, your Honor. We have
4 estimates right now, based upon review of the records that are
5 publicly available, as to the number of persons who receive
6 refugee or asylee status and lived in Sudan from 1997 to 2011.
7 They still would then need to make a claim at the end of the
8 process.

9 THE COURT: Let's say defendants wanted to settle it
10 at this point when there's a class judgment. Would they be
11 able to? Would I be able to approve an award?

12 MR. HAUSFELD: Yes, your Honor.

13 THE COURT: Well, how would that be based? Let's say,
14 if you want more than the jury decision, than the jury verdict
15 for the class, how could there be a settlement? And if you
16 don't want to take away the rights of the individuals, how
17 could defendants settle? They would need releases, and they
18 couldn't get releases.

19 MR. HAUSFELD: If the class were certified and it was
20 a class judgment, all class members would be bound by that.

21 THE COURT: Exactly. Even though they have larger
22 claims.

23 MR. HAUSFELD: They would only be releasing the claim
24 with regard to the forced displacement, not for the aggregating
25 injuries.

1 THE COURT: You are not going to get a settlement on
2 that basis. I don't see how I would be able to approve it.

3 MR. HAUSFELD: Your Honor, if I may, there's a
4 two-track process here, which could proceed as two tracks or
5 one track with two levels. The two-track process would be a
6 settlement or a verdict on a class basis with regard to the
7 violation of Swiss law with an award of an aggregate class
8 damage for the moral injury.

9 THE COURT: Which can be executed upon?

10 MR. HAUSFELD: Can be?

11 THE COURT: Executed upon.

12 MR. HAUSFELD: Yes. Claims would have --

13 THE COURT: Even though that is not a final judgment?

14 MR. HAUSFELD: It would be final as to that claim.

15 THE COURT: Could it be appealed?

16 MR. HAUSFELD: It could be.

17 THE COURT: Would it be appealable as of right?

18 MR. HAUSFELD: I don't see why not.

19 THE COURT: It's not a final judgment.

20 MR. HAUSFELD: It would be a final judgment with
21 regard to that claim under Swiss law.

22 THE COURT: That's not a final judgment. That's a
23 partial judgment.

24 MR. HAUSFELD: The other claims would be for different
25 violations dealing with the aggravating injuries of torture,

1 rape, et cetera.

2 THE COURT: It's in a package?

3 MR. HAUSFELD: We can put it in a package, your Honor.

4 Again, if there was an award for the moral injury for every
5 individual, that gets added on to a final package when the
6 individual's aggravating injuries are combined with a jury
7 trial adding the separate moral damage.

8 THE COURT: I'm going to reread the European cases;
9 I'm going to reread our own law on class settlements, and come
10 to a decision. Meanwhile, you go ahead, but I can tell you
11 that my strong feeling is that there can be no monetary
12 judgment on the basis of the class trials.

13 Tell me about another issue. What about the
14 individual cases? How many are there?

15 MR. HAUSFELD: We estimate there are going to be
16 thousands of individual cases among the aggregate of refugees
17 and asylees.

18 THE COURT: And will they be bound by the class
19 determination.

20 MR. HAUSFELD: They will be bound by class
21 determination.

22 THE COURT: So there will not be individual cases;
23 they'll be individual claims that do apply?

24 MR. HAUSFELD: Yes.

25 THE COURT: I'm asking you how many individual cases

1 are now on file with the United States District Court?

2 MR. HAUSFELD: The visa cases, your Honor, the non-
3 refugee/asylee?

4 THE COURT: Those are your class members. Are there
5 individual cases now pending in the court?

6 MR. HAUSFELD: 600, your Honor, I'm told.

7 THE COURT: What would I do with them?

8 MR. HAUSFELD: What you would do is follow your
9 blueprint in 9/11.

10 THE COURT: Are you representing those people?

11 MR. HAUSFELD: If they are class members, yes.

12 THE COURT: So they are not class members. They
13 brought their own cases.

14 MR. HAUSFELD: We will give them the option at this
15 point, since now they are not class members, to select their
16 individual counsel.

17 THE COURT: They are separately represented?

18 MR. HAUSFELD: Not right now, your Honor.

19 THE COURT: Who represents them?

20 MR. HAUSFELD: We do until we notify them that they
21 are not in the class, and they need to seek individual
22 representation.

23 THE COURT: Ms. Boyd, there are 600 cases in the
24 court?

25 MS. BOYD: There are approximately 600 visa cases that

1 are defined out of the class.

2 THE COURT: Why were they defined out of the class?

3 MS. BOYD: Well, because originally our class was
4 defined as all Sudanese-Americans, whether they came in through
5 refugee/asylee status, or they came in through other ways like
6 visas, spousal visas, diversity visas. Those visa recipients,
7 we have fee agreements with them. We have engagement
8 agreements with them, so we do represent them right now. And
9 we filed their individual cases once your Honor ruled the
10 class. We filed their individual cases. We had a duty to do
11 that under the statute of limitations.

12 We are in the process of contracting all of these
13 hundreds, which is a long process, to tell them what happened,
14 explain to them they have the opportunity to seek other
15 counsel, that their cases are filed with the court, and they
16 would be proceeding individually. We think procedurally it
17 makes the most sense to stay those cases until resolution of
18 the class trial, which has substantial overlapping issues,
19 which may be, because they are all in privity, collateral
20 estoppel. So we would be asking for stays of those individual
21 matters until the class-wide cases are resolved.

22 THE COURT: How could you be on both sides of a stay
23 motion?

24 MS. BOYD: How could I be on both sides of a stay
25 motion? Well...

1 MR. HAUSFELD: It's my opinion, your Honor, that those
2 other plaintiffs need to --

3 THE COURT: I can't hear you, Mr. Hausfeld.

4 MR. HAUSFELD: Those other plaintiffs need to retain
5 other counsel.

6 THE COURT: Yes.

7 MR. HAUSFELD: That's what we need to advise them of
8 and have them do that. But at that point when they do, the
9 separate track of individual mass-tort-type cases can be
10 combined with the mass-tort-type classes of the class members.

11 THE COURT: You say, though, that these are not people
12 who are refugees or asylees?

13 MR. HAUSFELD: Correct.

14 MS. BOYD: They suffer the same persecution. They
15 just came to the United States in a different way.

16 THE COURT: What's your thoughts, defendants?

17 MR. BOCCUZZI: I think your Honor, just to be clear,
18 there are about 600 plaintiffs. There's six captioned cases.
19 The first three were filed last year, and all those seem to
20 plead that they're refugees, except for about six of them where
21 they just say they arrived in the U.S.

22 And then we have the three new actions filed this
23 year, which we understood would be on behalf of visa status
24 folks who are here, but now we understand that it's kind of a
25 mix. And so, plaintiffs need to figure out who is a refugee,

1 who is an asylee, and I guess all of those people would be
2 absorbed into the class. And the visa folks in these three
3 cases and maybe one of the old cases from last year would
4 proceed with separate counsel. We certainly think it makes
5 sense for them to figure out who is what and what they are
6 going to plead, because right now it seems like we have a bunch
7 of placeholders. But it's not clear to me that once we
8 understand the situation, that we'd want to have a stay,
9 because, for example, there have been discussions among the
10 parties, and as your Honor did in 9/11, there's the
11 questionnaire process. There could be information that is
12 gathered from the parties that is relevant either to a
13 bellwether stage or class-wide defenses.

14 THE COURT: We're ahead of ourselves. We don't know
15 what the story is. We don't know if they can succeed in those
16 cases or not.

17 MR. BOCCUZZI: I'm all saying is --

18 THE COURT: I don't think you can combine plaintiffs
19 in a single caption. In 9/11, I required everybody to get a
20 separate caption and get a separate index number. That process
21 itself will eliminate a lot of people.

22 Look, at this point, I'm not going to entertain a
23 motion to stay. I've got to figure out a way to deal with
24 these cases, and we have to do that.

25 They were filed when? When Judge Nathan was presiding

1 or when I was presiding?

2 MS. BOYD: When you were presiding, we filed the first
3 three, and the -- all of them were filed. Your Honor, we do
4 need to voluntarily dismiss quite a few of the individual
5 claims because they are class members, so we need time to just
6 do that because they are part of the class.

7 (Continued on next page)

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1 THE COURT: I'll wait and not do anything until you go
2 through that process.

3 MS. BOYD: Thank you.

4 THE COURT: When do we meet again? How much time do
5 you need to address the State Department and get a response, to
6 look at the cases you are going to dismiss?

7 MR. HAUSFELD: Given the summer months, your Honor, I
8 would say 30 days.

9 THE COURT: I don't think you will get an answer from
10 the State Department in 30 days. They don't do passports well.

11 Give me a realistic time.

12 MR. HAUSFELD: September.

13 THE COURT: How about September 24 at 2:30? If you
14 need me before then, let me know.

15 MR. HAUSFELD: Yes, your Honor.

16 THE COURT: You are going to see what you can get out
17 of the State Department. If the answer is you get a subpoena,
18 you will make a motion.

19 MR. HAUSFELD: Yes, your Honor.

20 THE COURT: Before then. Don't wait.

21 What else do you have to do?

22 MR. HAUSFELD: At this point, given what we are now
23 looking at, that would need to be done.

24 Do we have your Honor's approval for the notice
25 program?

1 THE COURT: I think you should develop a form of
2 notice.

3 MR. HAUSFELD: Thank you.

4 THE COURT: It may possibly be wasted time if the
5 State Department is not cooperative, but I think you should do
6 the notice.

7 MR. HAUSFELD: We can get a notice --

8 THE COURT: It has got to be in English, doesn't it?

9 MR. HAUSFELD: I would think it would be in both, your
10 Honor.

11 MR. BOCCUZZI: On the form of notice, there have been
12 a round of drafting between the defendants and the plaintiffs
13 where we gave them comments. They took some. Some were
14 subject to the discussion today about whether there would be a
15 class-wide damage, etc., and that was part of the disagreement
16 in the form of notice. Should the parties go back to the
17 drawing board and see if we could narrow any other differences
18 on the form before it comes to your Honor?

19 THE COURT: Well, it depends on you. I don't want you
20 to waste time when you need rulings.

21 One minute.

22 I think you should do it on a form where it describes
23 the issues to be decided by a class, and thereafter there will
24 be procedures to undertake claims and procedures for assessing
25 damages or determining damages. You work out that language. I

1 think that's what we are talking about today.

2 MR. HAUSFELD: That's what I understood, your Honor.

3 THE COURT: Thank you very much.

4 (Adjourned)

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